89-957

No._____

IN THE

Supreme Court of the United States

October Term 1989

TRANSPORTES DEL NORTE,

Petitioner,

vs.

ANITA CLARK, et al

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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December 1989

38 pp

Question Presented

Whether the decision of the Supreme Court of Texas, holding that the error of the trial court was not properly preserved for appeal, violates the Fourteenth Amendment to the Constitution of the United States by taking the property of petitioner Transportes del Norte without due process of law.

List of Parties

In addition to the parties listed in the caption to the case is the other defendant below, Trailways, Inc. and the other Plantiffs, to-wit:

Gilberto Mayorga

Gloria Trevino

Richard H. Trejo

Linda Ramirez

Nilda Rangel

Cynthia Cortez

Estate of Eulalia P. Mayorga

Estate of Emma Aurora Salazar Trejo

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner Transportes del Norte ("TDN"), respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Texas.

Opinions Below

The order of the Supreme Court of Texas denying TDN's motion for a rehearing is unreported (*See* Appendix A, *infra*, la.). The opinion of the Supreme Court of Texas is reported at 774 S.W.2d 644 (Appendix B, 3a-15a.). The opinion of the Corpus Christi (Texas) Court of Appeals, Thirteenth Supreme Judicial District is published at 756 S.W.2d 786 (Appendix C,16a-20a.). The order of the 138th District Court, Cameron County, Texas, is not reported (Appendix D,21a.).

Jurisdiction

The decision by the Supreme Court of Texas was entered on May 31, 1989. A timely motion for rehearing by petitioner TDN to the Supreme Court of Texas was denied on September 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Constitutional Provision Involved

The Fourteenth Amendment provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

The constitutional right deprived TDN arose out of a relatively ordinary set of facts. In the fall of 1979, two women, Eulalia P. Mayorga and Emma Aurora Salazar Trejo, purchased round trip bus tickets in Corpus Christi, Texas, for transportation between Corpus Christi and Mexico City, Mexico. The trip from Corpus Christi to Brownsville, Texas was made by the women on a Trailways bus. In Brownsville they transferred to a bus owned by Transportes del Norte ("TDN"), a Mexican company. The women were killed while traveling in Mexico on a TDN bus when it veered off the road and overturned (Appendix B, at 4a).

The survivors of the deceased women and the personal representatives of the deceased women's estates ("Plaintiff"), sued TDN and Trailways, Inc. Plaintiff won a verdict in excess of one million dollars ($1,000,000) after the trial court permitted them to call as a witness Hector Lira Morales (Appendix C, at 16a.).

Lira Morales investigated the accident which killed Mayorga and Salazar Trejo for the Mexican federal police. In 1981, attorneys for TDN requested that Clark disclose the names and addresses of any persons who investigated the accident. Clark responded by stating that the names and addresses of any such persons was unknown (Appendix B, at 4a.). This response was supplemented in 1986, one week before trial, by incorporating by reference an exhibit produced at the deposition of a TDN employee (*Id.* at 4a.). Apparently included within this exhibit was Hector Lira Morales's name. On the day before trial, TDN moved for sanctions pursuant to Texas Rule of Civil Procedure 215(5), specifically to bar the testimony of Lira Morales on the

ground that the supplementary response violated Texas Rule of Civil Procedure 166b(5), which requires that all supplementary discovery responses be made at least thirty (30) days before trial. The trial court held a hearing on the matter, overruled TDN's motion for sanctions and permitted Lira Morales to testify as an expert for the plaintiff (*See* Appendix D.) Lira Morales testified that in his expert opinion the bus drivers negligence caused the accident. This was the only evidence of TDN's negligence (Appendix C, at 19a.).

The Corpus Christi Court of Appeals, Thirteenth Supreme Judicial District, reversed the judgment of the district court, holding that the refusal of the district court to grant the motion for sanctions was error, and that the error was harmful, since Lira Morales was the only witness testifying to the bus driver's, and hence TDN's, negligence (*See* Appendix C.). Plaintiff appealed to the Supreme Court of Texas, which reversed the Corpus Christi Court of Appeals (*See* Appendix B.). The Supreme Court of Texas held that, while the trial court should not have allowed the testimony of Lira Morales, it would not decide whether admitting Lira Morales's testimony was error, because, in its view, TDN had failed to preserve the error at the trial court (Appendix B, at 7a.). TDN objected to Lira Morales's testimony the day before trial; it did not renew that objection when Lira Morales was called to the stand to testify at the trial. TDN moved for a rehearing in the Supreme Court of Texas, alleging that the court's decision that error had not been preserved took its property without due process of law, in violation of the Fourteenth Amendment. That motion was denied by the Supreme Court of Texas on September 13, 1989 (*See* Appendix A.).

Reasons for Granting the Petition

In determining that TDN had failed to preserve for appellate review the error of the trial court, the Supreme Court of Texas perpetuated an injustice which deprives TDN of property without due process of law. It is clear that without the testimony of Hector Lira Morales, the plaintiff's case against TDN would have collapsed. With his testimony, the plaintiff was awarded damages in excess of $1,000,000. Consequently, the decision of the Supreme Court of Texas presents an important question of constitutional law which should be decided by the Supreme Court.

As an initial proposition, TDN is entitled to due process protections granted to "persons" in the 14th Amendment. *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408 (1984). Further, a decision of a state court awarding monetary damages to a plaintiff deprives a defendant of property, triggering some due process protections for the defendant. *See Hovey v. Elliot,* 167 U.S. 409 (1897). The Due Process Clause of the Fourteenth Amendment applies to state judicial as well as legislative and executive action. *Ownbey v. Morgan,* 256 U.S. 94, 111 (1921). Finally, a state must act within the strictures of the Due Process Clause in determining its procedural, as well as substantive law. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 682 (1930).

The *Brinkerhoff-Faris* case requires all states to adhere to some due process standards in creating or implementing its rules of civil procedure. What particular process a state must constitutionally accord a defendant in a tort case based on state law has not been defined by the Supreme Court. It is clear, however, that a defendant's property simply may not

be taken by the state without regard to any due process limitations. *See Grannis v. Ordean,* 234 U.S. 385, 394 (1914). If it were otherwise, that would permit a state government to undertake arbitrary action, forbidden by the Due Process Clause of the Fourteenth Amendment. *See Wolff v. McDonnell,* 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government," *citing Dent v. West Virginia,* 129 U.S. 114 (1889)). The petition for a writ of certiorari should be granted in order to present the states with some constitutional guidelines concerning the implementation of their rules of civil procedure, which daily are utilized to take the property of persons.

Framing the contours of the due process clause has been something the Supreme Court has struggled with throughout its history. In interpreting the Due Process Clause of the Fifth Amendment, the Supreme Court in *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. (18 How.) 272 (1855) stated, "The Constitution contains no description of those processes which [due process] was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process." *Id.* at 276. Yet, the Court declared that due process bound Congress to some extent. *Id.* Later that century, the Court created some boundaries for Fourteenth Amendment Due Process jurisprudence. In *Davidson v. New Orleans,* 96 U.S. 97 (1878), Justice Miller examined the meaning of the Due Process Clause of the Fourteenth Amendment:

> But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that "No State shall deprive any person of life, liberty, or property without due process of law," can a State make anything due

process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. It seems to us that a statute which declared in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision. *Id.* at 102.

Miller continued by noting that the curx of whether due process was afforded the complainant was whether he was given notice and an opportunity to a "full and fair hearing in the court of first instance, and afterwards in the Supreme Court [of Louisiana]." *Id.* at 105. *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. at 678 (defining due process of law "in its primary sense of an opportunity to be heard and to defend its substantive right.") Six years later, the Court stated in *Hurtado v. California,* 110 U.S. 516 (1884), that the due process guarantee was "intended to secure the individual from the arbitrary exercise of the powers of government." *Id.* at 527 *(quoting Bank of Columbia v. Okely,* 17 U.S. (4 Wheat.) 235, 244 (1819)).

In this century, the contours of the due process clause have been framed in more positive terms. "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." *Daniels v. Williams,* 474 U.S. 327, 331 (1986). The Fourteenth Amendment's Due Process Clause is also part of

a Constitution designed to "secure certain individual rights against both State and Federal Government." *Id.* at 332.

In more generalized terms, an insightful essay on the constitutional implications of civil procedure has identified three functions of a civil court; "making rights meaningful, ensuring governmental consistency, and ensuring access to judicial decisionmaking." Leubsdorf, *Constitutional Civil Procedure,* 63 Tex. L. Rev. 579, 591 (1984). The notion of due process encompasses these three functions. It is intended to protect the individual's rights to liberty and property against arbitrary governmental, action; it reaffirms the rule of law by constitutionalizing a standard of some process, thus requiring a consistent decisionmaking method; and gives litigants an opportunity to be heard and to defend their substantive rights. As stated by Leubsdorf, once rights are conferred, "it is unjust to take them away through judicial blundering." *Id.* at 592 (Footnote omitted.).

The decision of the Supreme Court of Texas denies TDN its Fourteenth Amendment right to due process because it fails to comport with any of the three measures stated above. TDN objected to Lira Morales's testimony on the day before the trial. The court's decision to hold waived TDN's objection to Lira Morales's testimony when the trial court, the district court of appeals and the parties all understood the issue of law on appeal makes TDN's due process rights meaningless, and encourages the arbitrary action of a state. TDN has a right to its property, and the decision of the Supreme Court of Texas denies to it its property.

Second, the manner in which the Supreme Court of Texas made its decision does not ensure governmental consistency, for it elevates the form of the objection over the substance

of the objection. *See* T. Cooley, *A Treatise Upon The Constitutional Limitations* 434 (6th ed. 1890) ("The principles, then, upon which the process is based are to determine whether it is 'due process' or not, and not nay considerations of mere form.") Third, it limits access to judicial decision-making. In essence, the decision of the Supreme Court of Texas gives TDN no hearing on its claim of trial court error. In lengthy dictum, the court concludes that the decision of the trial court was error. It then refuses to hear TDN's apparently decisive claim on the grounds that the error was not preserved. In practical terms, it prevents TDN from obtaining a hearing and defending its substantive rights in the Supreme Court of Texas, for a conclusion of waiver means that there is no issue for the court to decide.

The Supreme Court has traditionally been reluctant to apply the Due Process Clause of the Fourteenth Amendment to a state court's decision to revise, reinterpret or overrule its previous decisions. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930). This must be accompanied, however, by an effective opportunity to be heard and to defend its substantive rights before the state court revises, reinterprets or overruled its previously stated law. The *Brinkerhoff-Faris* case is a good example.

The Company sued in state court praying for injunctive relief against the county tax assessor, Hill. Their complaint was that the assessor violated the 14th Amendment's Equal Protection Clause by assessing its stock at full value, while assessing other property at less than full value. *Id.* at 674. The trial court refused to issue the injunction and dismissed the bill. *Id.* at 675. On appeal, the Missouri Supreme Court held that the Company was guilty of laches in failing to first file a claim with the state tax commission, and consequently

affirmed the decision of the trial court. *Id.* at 675-76. This decision overruled *Laclede Land & Improvement Co. v. State Tax Comm'n*, 295 Mo. 298, 243, S.W. 887 (1922), which held that the Commission had no statutory power to grant relief. In rendering its decision in *Brinkerhoff-Faris*, the essence of the Missouri court's ruling was that it refused to hear the Company's appeal. The Supreme Court held that the Missouri court's action violated the Due Process Clause of the Fourteenth Amendment, for it gave the Company no opportunity to be heard and to defend itself. *See also Saunders v. Shaw*, 244 U.S. 317 (1917) (state supreme court denied party due process of law when reversing trial court decision in party's favor because the state supreme court decided the case against him without giving him the opportunity to present evidence in his behalf at trial). This is analogous to the situation that TDN finds itself in.

It is crucial in our system of justice that due process be afforded all parties in state and federal court. While the form and substance of Texas rules of civil procedure are largely its concern, there are some Fourteenth Amendment due process parameters in the implementation and use of those Rules. This case presents the important constitutional issue of defining some of those due process parameters.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1989

APPENDIX A

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RE: Case No. C-7972

STYLE: ANITA CLARK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EULALIA P. MAYORGA ET AL. v. TRAILWAYS, INC. ET AL.

Dear Counsel:

Today, the Supreme Court of texas overruled the motion for rehearing, as supplemented, of Transportes del Norte, and the motion for rehearing of Trailways, Inc. in the above referenced cause. Conditional motion for rehearing of Anita Clark et al. was dismissed.

Respectfully yours,

John T. Adams, Clerk

By_____
Peggy Littlefield, Chief Deputy

APPENDIX B

Anita Clark, Individually and as Personal Representative of the Estate of Eulalia P. Mayorga et al, Petitioners,

v.

TRAILWAYS, INC. et al., Respondents.

No. C-7972.

Supreme court of Texas.

May 31, 1989

COOK, Justice.

This court is once again called upon to address the sanctions to be imposed on a party who fails to timely supplement responses to discovery requests. Anita Clark and Linda Ramirez (collectively referred to as "Clark") are the survivors of Eulalia P. Mayorga and Emma Aurora Salazar Trejo, respectively, who were killed in a bus accident in Mexico. Clark brought this wrongful death and survival action against Transportes del Norte ("TDN") and Trailways, Inc. and eventually received judgment at the trial court level. Upon finding that the trial court abused its discretion in permitting Clark's liability witness to testify, the court of appeals reversed the judgment of the trial court and remanded for a new trial. 756 S.W.2d 786 (Tex.App.Corpus Christi 1988). We reverse the judgment of the court of appeals and remand the cause to that court for further proceedings.

In October 1979 Mayorga and Trejo purchased round trip tickets to Mexico City from a Trailways bus station in Corpus Christi, Texas. The decedents departed Corpus Christi

in a Trailways bus, but were later transferred to a TDN bus at Brownsville, Texas, for the remainder of the trip. Prior to reaching their destination, Mayorga and Trejo were killed when the TDN bus veered off a roadway in Mexico and overturned. The jury found that TDN, through the driver of its bus, was negligent in maintaining a proper lookout and rate of speed. Based on these jury findings, the trial court rendered judgment against TDN and Trailways.

The primary dispute on appeal arises from Clark's failure to supplement a pretrial discovery request made by TDN. In 1981 TDN served Clark with interrogatories that included a request for the name and addresses of any persons who investigated the accident, as well as the details of any oral reports received from such persons. Clark initially responded that the identities and other requested information about such persons were unknown. However, Clark supplemented this response on August 27, 1986, by directly referencing an exhibit to the deposition of a TDN employee, which had previously been filed with the court. The relevant document in this exhibit had originally been produced by TDN. After receiving the supplemental response, TDN filed a motion for sanctions and requested the trial court not to permit the testimony of any liability witness whose name and address should have been revealed in Clark's answers to the interrogatories. The trial court overruled the motion at a pretrial hearing and began trial on September 2, 1986.

TDN contends that the trial court abused its discretion by allowing the testimony of Hector Lira Morales, who investigated the accident for the federal police in Mexico. At the time of the trial in 1986, the text of Tex.R.Civ.P. 215(5) (Vernon Supp.1987) read as follows:

5. *Failure to make supplementation of discovery*

> *response in compliance with Rule 166b.* A party who fails to supplement seasonably his response to a request for discovery in accordance with paragraph 5 of Rule 166b shall not be entitled to present evidence which the party was under a duty to provide in a supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter when the information required by Rule 166b concerning the witness has not been disclosed, unless the trial court finds that good cause sufficient to require admission exists.[1]

The record does not indicate that Clark supplied TDN with Lira's address as requested in its interrogatories. Thus, the trial court should not have allowed Lira's testimony absent a finding of good cause to require its admission. *Morrow v. H.E.B., Inc.,* 714 S.W.2d 297, 297-98 (Tex.1986) (per curiam).

The good cause exception to rule 215(5) must be viewed in perspective with the underlying principles of the discovery process. By excluding the testimony of witnesses whose identities or locations are not revealed in response to discovery requests, rule 215(5) promotes full discovery and deters litigants from violating discovery rules. However, this sanction was neither designed nor intended to punish a litigant who cannot, in the exercise of good faith and due diligence, respond to a discovery request in a timely manner. The good cause cause exception thus provides trial courts with the latitude to permit testimony in those situations and excuse the party's failure to timely supplement the discovery re-

1. This rule was amended effective January 1, 1988, to place the burden of establishing good cause on the party offering the evidence and to require good cause to be shown in the record. Tex.R.Civ.P. 215(5).

quest. Nevertheless, parties should not be permitted to rely on the goodexception as a means to evade their duty to engage in full discovery. Thus, a showing of good cause pursuant to rule 215(5) must encompass a showing of good cause for the offering party's failure to respond to proper discovery requests. *See Galvin v. Gulf Oil Corp.*, 759 S.W.2d 167, 171-72 (Tex.App.Dallas 1988, writ denied).

Upon overruling TDN's motion for sanctions, the trial court stated that "if (Lira) was the original DPS (sic) officer, the investigator of this particular accident, I think that he sure would be a witness in this particular proceedings." This statement suggests that the trial court predicated its implicit finding of good cause on the fact that Lira, as the original investigating officer at the accident, possessed peculiar knowledge of the underlying facts of the accident. However, this fact cannot constitute good cause sufficient to require the testimony of Lira. A contrary rule would permit a party opposing discovery to deliberately withhold the name and other discoverable information concerning a key liability witness, and then emphasize the peculiar knowledge held by that witness as being a factor of good cause to excuse the party's failure to disclose. Such a result would only frustrate the underlying purpose of rules regarding discovery, which were designed to prevent "trial by ambush" and to ensure fairness. *Gutierrez v. Dallas Indep. School Dist.*, 729 S.W.2d 691, 693 (Tex.1987).

As the party offering the testimony of Lira, Clark bore the burden to show good cause to the trial court. *Yeldell v. Holiday Hills Retirement & Nursing Center, Inc.* 701 S.W.2d 243, 246-47 (Tex.1985). Clark did not make any such showing at the pretrial hearing on TDN's motion for sanctions. Despite this failure to show good cause at the hearing, Clark

points out that the deposition of Lira had been filed with the trial court at the time of the hearing. For this reason, Clark contends that the trial court was permitted to consider the deposition testimony of Lira in determining the existence of good cause. Furthermore, Clark relies upon *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex.1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986), for the proposition that the trial testimony of Lira provides an additional basis for affirming the good cause finding. According to Clark, the trial court retained plenary jurisdiction to review its pretrial order on TDN's motion for new trial; thus, in reconsidering its order allowing Lira's testimony, the trial court was permitted to review all evidence that had been subsequently placed in the record, including Lira's testimony at trial. *See Downer*, 701 S.W.2d at 241.

Nevertheless, Lira's testimony at deposition and trial does not provide any facts to support the trial court's finding of good cause. According to his deposition testimony, Lira was not contacted about becoming a witness in the case until approximately ten days prior to the eventual date of trial. Lira also denied having given any reports regarding the accident up to that date, apart from his original investigation report prepared immediately following the accident. At trial, Lira further claimed to have moved frequently to various locations in Mexico following the accident.

These facts, however, do not permit a reasonable inference that Clark was unable to comply with the discovery request by TDN or seasonably supplement its answers to those requests. Lira's testimony falls short of indicating Clark's good faith efforts to locate Lira or her inability to anticipate the use of his testimony at trial, which could otherwise support a finding of good cause to permit the testimony

of an unidentified witness. *See, e.g., Johnson v. Gulf Coast Contracting Servs., Inc.,* 746 S.W.2d 327, 329 (Tex.App.Beaumont 1988, writ denied); *Ellsworth v. Bishop Jewelry & Loan Co.,* 742 S.W.2d 533, 534 (Tex.App.Dallas 1987, writ denied). The trial court thus abused its discretion in finding good cause to allow the testimony of Lira.

We do not reach the issue of whether the admission ofLira's testimony constitutes reversible error, because TDN and Trailways failed to properly preserve their complaint as to the admission of his testimony. Generally, parties must present a timely objection, motion, or request to the trial court in order to preserve a complaint for appellate review. Tex.R.App.P. 52(a). By failing to object when an undisclosed witness is offered at trial, a party waives any complaint under rule 215(5) as to the admission of testimony from that witness. *Security Ins. Co. v. Nasser,* 755 S.W.2d 186, 194 (Tex.App.Houston (14th Dist.) 1988, no writ); *Greenstein, Logan & Co. v. Burgess Mktg., Inc.,* 744 S.W.2d 170, 178 (Tex.App.Waco 1987, writ denied).

Neither TDN nor Trailways raised an objection under rule 215(5) when Lira testified at trial. Nevertheless, they contend that TDN's pretrial motion for sanctions properly preserved their complaint as to the admission of Lira's testimony. We disagree. The rules requiring timely objections or motions are designed to allow trial courts to correct any errors made during the course of the proceedings. *E.g., Lewis v. Texas Employers' Ins. Ass'n,* 151 Tex.95, 99, 246 S.W.2d 599, 601 (1952). By failing to object when an undisclosed witness or evidence is offered at trial, parties such as TDN and Trailways effectively deny a trial court the opportunity to review and correct a prior finding of good cause. Parties in any instance should not assume that the trial court is in-

capable of recognizing an error in a previous finding of good cause.

Moreover, an erroneous finding of good cause under rule 215(5) does not provide a basis for reversal on appeal unless the undisclosed witness or evidence is actually offered and admitted at trial. An objection or motion at that point in the proceedings provides the trial court with a final opportunity to prevent the erroneous admission of the testimony or evidence, thereby avoiding the possibility of a complete new trial to correct any reversible error resulting from its admission. The efficient administration of justice thus requires that trial courts have the opportunity to review any previous finding of good cause, regardless of whether the finding occurred several months or one day prior to the actual offering of the testimony or evidence at issue.

For these reasons, we believe that the better-reasoned approach is to require a party opposing the admission of testimony or evidence under rule 215(5) to object when the testimony or evidence is offered at trial.[2] This rule serves the dual purpose of ensuring trial courts the opportunity to review any previous finding of good cause, while providing litigants and courts alike with a uniform and consistent rule regarding the preservation of error under rule 215(5). By

2. In finding that TDN and Trailways properly preserved error, the dissent places great reliance on the fact that the trial court ruled on the pretrial motion for sanctions on the day preceding Lira' testimony at trial. The dissent unfortunately fails to provide practitioners and appellate courts with a workable rule regarding the preservation of error under rule 215(5). Litigants in Texas courts should instead be provided with uniform and consistent rules regarding the proper preservation of error.

The dissent's reliance on Tex.R.App.P. 52(b) is misplaced. When a court hears objections to offered evidence outside the presence of the jury and admits the evidence, rule 52(b) relieves a party from having to reurge its objection before the jury. A pretrial objection occurs prior to the actual offering of the testimony and is thus not addressed by rule 52(b). Under the dissent's reading fo the rule, however, a party could theoretically preserve error by merely raising an objection at any point prior to trial.

failing to object when Clark offered Lira's testimony at trial, TDN and Trailways waived their complaint as to the admission of his testimony.[3]

In holding that the trial court committed reversible error by allowing the testimony of Lira, the court of appeals did not reach the other points of error raised by TDN and Trailways on appeal. We thus remand this cause to the court of appeals to address the remaining points of error. *McConnell Const. Co. v. Insurance Co. of St. Louis*, 428 S.W.2d 659, 661 (Tex.1968).

We reverse the judgment of the court of appeals and remand the cause to that court for further proceedings.

GONZALEZ, J., dissents.

GONZALEZ, Justice, dissenting.

I am troubled by the court's opinion. Without any discussion or analysis, the court states that the trial court *implicitly* found that good cause existed for the admission of testimony of an undisclosed witness. If we are to presume that the trial court found good cause when there is no express finding, we owe the bench and bar some guidance on this issue. Furthermore, the court agrees with the court of appeals that the trial court abused its discretion in allowing the testimony of the undisclosed witness and discusses at length the good cause exception. The court then states that it need not determine whether the erroneous admission of the

[3] This court in Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex.1989), suggested in dicta that the overruling of a pretrial motion to exclude undisclosed witnesses under rule 215(5) would be sufficient to preserve error. In Gee, we did not directly address the issue presented in this case, i.e., the proper time for objecting under rule 215(5), since neither party contested the court of appeals' holding that error had not been preserved with respect to two undisclosed witnesses. Gee, 765 S.W.2d at 396. Thus, the dicta in Gee is not controlling on this issue.

evidence constituted reversible error because the error was waived. Since this case does not turn on whether or not there was good cause, the lengthy discussion on good cause is confusing and unnecessary. More important, however, is the court's holding that the objection to the testimony of the undisclosed witness was waived. It is for these reasons that I dissent.

In order to put the issues before the court in proper perspective, a chronology of events is helpful. This case involved a bus accident that occurred in Mexico in 1979 which resulted in the deaths of two relatives of the petitioners (collectively refereed to as "Clark"). The investigating officer was Hector Lira Morales (Lira) who concluded in his report that the cause of the accident was mechanical failure.

Suit was filed in September of 1980. In October of 1980, Transportes del Norte (TDN) served interrogatories on Clark seeking the names and addresses of "potential liability witnesses." In 1981, Clark answered "I do not know" and that such information is "unknown." In May of 1985, Clark filed supplemental answers to some of TDN's interrogatories but filed no supplementation regarding the disclosure of potential liability witnesses. Less than a week prior to trial, on August 27, 1986, Clark filed additional supplemental answers which did not identify Lira as a witness with knowledge of relevant facts; however, the answers referred to "Exhibit 9 to Javier Plascencia Rodriguez' deposition." This exhibit allegedly consists of over fifty different documents which were written in Spanish and attached to a deposition taken by Clark. The exhibit was not introduced into evidence and it was not made part of the record. Lira's name is supposedly somewhere among these documents.

Approximately a week before trial TDN's attorney was informed by Clark's attorney that they intended to call a secret witness who had never been disclosed in answer to interrogatories. Clark's attorney refused to disclose the name of the witness, yet agreed to produce the witness at a deposition on Labor Day, 1986, the day before the trial.

On August 29, 1986, TDN filed a motion for sanctions under Tex.R.Civ.P. 215(5) in which it asked the trial court not to permit any witness to testify who had not been revealed in response to TDN's interrogatories. On September 2, 1986, the trial court held a hearing on the motion which was specific to Lira, the previously undisclosed witness. Without a showing of good cause by Clark for failure to supplement their answers to the interrogatories in question, the trial court denied the motion for sanctions and ruled that he would allow Lira to testify. Trial commenced the next day and for more than a year's wages as his fee, Lira testified that the accident was caused by excessive speed. The trial court rendered a judgement on the verdict in favor of Clark.

The court of appeals held that the trial court abused its discretion in allowing the undisclosed witness to testify. The majority agrees with the court of appeals on this issue, however, it reverses the judgment of the court of appeals on the basis that this error was not preserved. I strongly disagree that TDN failed to preserve any complaint as to the erroneous admission of Lira's testimony.

It is important to emphasize the time frame in which the relevant sequence of events occurred. The pre-trial hearing, during which the motion to exclude Lira's testimony was argued and ruled on, occurred the same day the jury was empaneled. On the next day, trial commenced and Lira was the first to testify. Thus, this is not a situation in which a party

makes a general pre-trial motion to exclude testimony of undisclosed witnesses and months later, when trial finally takes place, fails to object to the admission of such testimony.

Despite the fact that TDN urged the trial court to exclude Lira's testimony one day before he testified, the court today adopts an inflexible rule and states that because the objection was not reiterated when the witness was called, error was not preserved.[1] A review of Rule 52(b) of the Texas Rules of Appellate Procedure offers some guidance and supports my belief that the court is in error.

Rule 52(b) provides in part:

> When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

Tex.R.App.P. 52(b).[2] In the context of this rule, I believe that the instant case is analagous and submit that the court heard an "objection" to Lira's testimony in the form of a motion for sanctions, after which it "ruled" that Lira would be allowed to testify. Although TDN did not technically object to the introduction of Lira's testimony *when* such was offered, the motion urged the day before should have relieved TDN from having to reurge its Rule 215(5) argument.

1. Neither of the cases cited by the court involved a pre-trial motion which specifically sought to exclude testimony of a particular undisclosed witness. See Security Ins. Co. v. Nasser, 775 S.W.2d 186 (Tex.App.–Houston [14th Dist.] 1988, no writ); Greenstein, Logan & Co. v. Burgess Mktg., Inc. 744 S.W.2d 170 (Tex.App.–Waco 1987, writ denied).

2. Rule 103 of the Texas Rules of Civil Evidence was recently amended to include this sentence. 33 S. Goode, O. Wellborn & M. Sharlot, Texas Practice § 103.1 (1988).

I believe the court goes astray in treating the motion for sanctions as a motion in limine. They are not the same. The trial court did not reserve ruling on the motion until some point during trial should the issue have arisen and an objection been raised, as is the procedure with regard to motions in limine. *See Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex.1963); *Union Carbide Corp. v. Burton*, 618 S.W.2d 410, 415 (Tex.Civ.App.Houston (14th Dist.) 1981, writ ref'd n.r.e.).

Finally, to obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the following must be shown: (1) that the trial court did in fact commit error; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. *Bridges v. City of Richardson*, 163 Tex. 292, 354 S.W.2d 366, 368 (1962); Tex.R.App.P. 81(b). In this connection, the court agrees with the court of appeals that it was error to admit Lira's testimony. Clark engaged in unsavory discovery tactics and sought to benefit from them. Because Lira was the only liability witness Clark produced at trial, the erroneous admission of his testimony was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

In conclusion, I see no need to adopt an inflexible rule which gives deference to form over substance. As in this case, where an undisclosed witness is the first to testify after a ruling on a motion for sanctions, and the parties and the trial court were aware of the intention to call the witness, the objecting party should not have to reurge its Rule 215(5) argument in order to preserve error. Having two sets of rules to preserve objections is another trap for lawyers. The unnecessary rigidity of the court's opinion results in an injustice in

this case. Also, since the court announces a new rule, it should not be applied retroactively.

The court of appeals was correct in reversing and remanding the cause for a new trial. Thus, I would affirm the judgment of the court of appeals.

APPENDIX C

TRIALWAYS, INC. and Transportes
del Norte, Appellants,

v.

Anita CLARK, Individually and as
Personal Representative of the Estate of
Eulalia P. Mayorga, et al., Appellees.

No. 13-87-227-CV.

Court of Appeals of Texas,
Corpus Christi.
June 30, 1988.
Rehearing Denied Aug. 31, 1988.
Appellee's Second Rehearing Dismissed
Sept. 8, 1988.

OPINION

KENNEDY, Justice.

This is a wrongful death case. Appellees, plaintiffs below, recovered over one million dollars in damages. Because the trial court abused its discretion in permitting an undisclosed liability witness to testify, we must reverse and remand this case for a new trial.

The two decedents were residents of Corpus Christi who decided to take a trip to Mexico City. In October of 1979, they purchased round-trip bus tickets at the Trailways bus station in Corpus Christi and left in a Trailways bus to

Brownsville. They were transferred to a bus owned and operated by Transportes del Nortes (TDN) for the remainder of their journey. Both women were killed in Mexico when that bus left the roadway near a curve. Appellees, family members of the two women, filed suit in 1980, but the case was not tried until 1986.

Appellant TDN's first point of error asserts that the trial court erred in permitting a surprise witness to testify.

In 1981, the appellees filed their answers to TDN's interrogatories. The interrogatories included requests for the name and addresses of any investigating official and any witness to the event after its occurrence, as well as any reports or statements made by them. Appellees responded that they were unaware of any such persons. They supplemented these answers in 1986, about one week prior to trial, stating simply that these persons were listed in Exhibit 9 to one of the depositions on file, although this exhibit is not attached to the deposition for our review.

TDN's attorney filed a motion for sanctions, asserting that appellees' undisclosed witness should not be permitted to testify at trial since appellees did not supplement their answers at least thirty days prior to trial, as Tex.R.Civ.P. 166b(5) requires. The trial court held a hearing on the motion, with comprises less than four pages in the statement of facts, and overruled it. The trial court permitted the witness, who was the Mexican police investigator of the accident, to testify as an expert that he thought the accident occurred at least in part because the driver of TDN's bus was driving too fast.

Under Tex.R.Civ.P. 215(5), a party who fails to timely supplement his response to a discovery request when required

to do so by Rule 166b(5) may not offer the undisclosed evidence at trial, unless the trial court finds good cause exists sufficient to require its admission. The sanction is automatic in the absence of a good cause showing by the party offering the evidence. *See generally E.F. Hutton & Co. v. Youngblood,* 741 S.W.2d 363, 364 (Tex. 1987); *Gutierrez v. Dallas Independent School District,* 729 S.W.2d 691, 693 (Tex.1987); *Morrow v. H.E.B.,* 714 S.W.2d 297, 297-98 (Tex.1986). Determination of good cause is within the sound discretion of the trial court. *Morrow,* 714 S.W.2d at 298.

The Supreme Court has made it abundantly clear that the courts will not tolerate even minor infractions of these rules. The purpose of discovery is to allow the parties "to obtain the fullest knowledge of issues and facts prior to trial." *Gutierrez,* 729 S.W.2d at 693. To permit attorneys to play games with the discovery rules would frustrate that purpose. *See generally Garcia v. Peeples,* 734 S.W.2d 343, 347 (Tex.1987). *See also Fina Oil & Chemical Co. v. Salinas,* 750 S.W.2d 32 (Tex. App.Corpus Christi, 1988) (rehearing on May 19, 1988) (orig. proceeding).

Appellees failed in their duty to supplement their responses by not revealing the investigating officer's identity and other requested information before the thirty-day period prior to trial. Therefore, they had the burden to show good cause to permit him to testify.

At the hearing on the motion for sanctions, appellees' attorney presented no evidence from which the trial judge could have concluded that good cause existed to prevent the automatic imposition of the sanction and permit the officer to testify. In fact, their attorney was silent but for making one hearsay objection. The appellants' attorney raised the proper grounds for the sanction, but the trial court overruled the

motion because "[i]f he [the officer] was the original DPS officer [sic], the investigator of this particular accident, I think that he sure would be a witness in this particular proceedings." As a matter of law, good cause was not shown. The trial court erred in permitting the testimony.

We next examine whether the error was harmful and therefore reversible under Tex.R.App.P. 81(b)(1).

The police officer's testimony was of crucial importance to appellee's case, since he was the only witness who testified to the bus driver's purported negligence, thereby providing the only evidence of appellants' liability for the deaths. This evidence was crucial to the appellees' cause of action. We conclude the error was harmful. *See Gutierrez,* 729 S.W.2d at 693; *Walsh v. Mullane,* 725 S.W.2d 263, 264-65 (Tex.App.Houston [1st Dist.] 1986, writ ref'd n.r.e.); *cf. Farm Services, Inc. V. Gonzales,* 756 S.W.2d 747 (Tex. App.Corpus Christi, 1988, no writ) (testimony of undisclosed witness was harmless error).

Appellees point out that the interrogatories did not seek the identity of witnesses to be called at trial, but only sought witnesses or investigating officials and their reports. They seem to argue that since appellants had a copy of the police officer's report long before trial, their failure to timely supplement the interrogatories was harmless error and caused appellants no surprise.

However, as the Supreme Court made clear in *Morrow,* arguing a lack of surprise misplaces the burden of proof. *Morrow,* 714 S.W.2d at 298. Moreover, appellants correctly point out that in the officer's report, prepared shortly after the accident, the officer did not mention speed as a factor contributing to the accident but blamed the cause on the bus's

mechanical failure.

The fact remains that Rule 215(5)'s automatic sanctions were in effect and appellees did not defeat them with a showing of good cause. The trial court abused its discretion and committed reversible error in permitting appellees' undisclosed witness to testify without an express showing of good cause, and the error was harmful. We sustain TDN's first point of error. We do not reach the remaining appellate points as they are not controlling. Tex.R.App.P. 90.

We are aware that this Court has recently decided *Farm Services, Inc. v. Gonzalez,* 756 S.W.2d 747, in which we reached a different result with respect to a witness not named. However, as the opinion in that case was careful to point out, the testimony of the witness in that case was cumulative of other evidence. We held that permitting her to testify was error, but was harmless error for this reason. Such is not the case here.

Because the appellants' cases are intertwined, it is impossible to separate them on appeal, and we must reverse and remand for each.

The judgment of the trial court is REVERSED AND REMANDED for a new trial.

APPENDIX D

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THE COURT: All right, as far as that motion is concerned, it'll be overruled. I'll allow him to go ahead and testify. If he was the original DPS officer, the investigator of this particular accident, I think that he sure would be a witness in this particular proceedings.